No. 1745.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE EXPLORATION MERCANTILE COMPANY (a Corporation),

Plaintiff in Error,

vs.

PACIFIC HARDWARE AND STEEL COMPANY (a Corporation), GIANT POWDER COMPANY, CONSOLIDATED, (a Corporation), and J. A. FOLGER AND COMPANY (a Corporation), Petitioning Creditors.

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF FACTS.

On the 6th day of August, 1908, Walter C. Stone, as an **individual** stock-holder, filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint in writing, the same being fully set out in the transcript on file herein, pages 7, 8, 9 and 10, and caused Summons to be regularly issued thereon.

This complaint was filed under Sec. 94 of the Incorporation law of the State of Nevada, Statutes of Nevada, 1903, p. 121, which reads as follows:

"Sec. 94.—Whenever a corporation has in ten

successive years failed to pay dividends amounting in all to 5 per cent. of its entire outstanding capital, or has wilfully violated its charter, or its Trustees or Directors have been guilty of fraud, or collusion or gross mismanagement in the conduct or control of its affairs, **or its assets are in danger of waste through attachment, litigation or otherwise,** or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs or to distribute its assets in a reasonable time or has become insolvent and is not about to resume its business with safety to the public, **any holder** or **holders** of **one-tenth** of the **capital stock, may apply** to the District Court, held in the District where the corporation has its principal place of business, for **an order** dissolving the corporation and **appointing a receiver** to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatever, except by and through a receiver appointed by the court. Such court may, if good cause exist therefor, appoint one ore more receivers for such purpose, but in **all cases Directors** or **Trustees** who have been guilty of no negligence, nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving such corporation and terminating its existence."

The italics are ours. This is the only statutory or other authority in Nevada for the proceedings taken in the State Court, and it will be seen: First, That **only** a stock-holder can take this proceeding and; Second, **Only** a **director** or **trustee**, when no charges are preferred, can be **appointed** receiver.

The defendant in the State Court, and the District Court of the United States was a corporation

of Nevada, (Transcript page 7) under this law.

That Summons was duly served on said corporation (Trans. p. 10), and service admitted, by C. E. Wylie, manager and director, (Trans p. 10); that the corporation duly appeared in the case and said C. E. Wylie asked, as Director to be appointed receiver (Trans. p. 11); that said Director Wylie was appointed receiver, gave his bond, and took his oath of office and possession of the property of the corporation as receiver, and has ever since been in the possession of the property of the corporation as receiver of said State Court. (Trans. p. 12).

These are all the proceedings in the State Court. These proceedings are charged to be an act of bankruptcyby the corporation.

After the receiver had been in possession of the property of the said corporation from Aug. 7th, 1908, to Sept 12th, 1908, the defendants in error, as petitioning creditors filed a petition in Involuntary bankruptcy against the Exploration Mercantile Company, the same thereafter being amended by leave of Court, and the amended petition is fully set out in the Transcript pp. 1 to 15 inclusive.

This amended petition sets up the said proceeding in the State Court, as an act of bankruptcy, by the orporation. No other act is alleged or averred, but it is sought, by averments of conspiracy, fraud, and agreement, of the officers of the corporation to allege and claim, dehors the record of the State Court, that the said proceedings in the State Court was the act and deed of the corporation, and that while the complaint in the State Court, upon its face, shows under (sup. div. 15, Sec. 1 of Bankrupt law of 1898), that the corporation was not insolvent, the averment of the complaint in the State Court being "that said corporation has liabilities in

the sum of Sixty-five Thousand Dollars ($65,000) and has assets, exceeding the sum of Ninety-five Thousand Dollars ($95,000.)., (Trans. p. 8.) Yet it was at the time insolvent. In other words, that the proceedings in the State Court was a sham and fraud—an imposition upon that court, and **false** in fact.

Process was regularly issued upon the Creditors petition and the defendant appeared and answered:

I. That it took no proceedings in the State Court, but that the same were taken against it. (Trans. p. 16).

II. That it was not insolvent. (Trans. p. 16).

III. That it never **applied** for a receiver. (Trans. p. 16.)

IV. That an attachment suit was brought and issued against it. (Trans. p. 16.)

V. That the directors and officers did not conspire, nor agree to take any measure to hinder, delay or defraud creditors.

VI. That the proceedings in the State Court was not the act or deed of the corporation.

VII. That the only statement by Stone was by way of compromise, and not otherwise and was wholly the result of the acts of the petitioning creditors.

VIII. That it did deny J. C. Kennedy access to the books of the corporation, because the books were not in the possession of the defendant, but in the custody of the officer of the State Court.

IX. That the State Court only had jurisdiction of the property of the defendant.

X. Demanded a jury.

The answer is a specific denial of the averments of the complaint, except as to the proceedings in the State Court, and particularly denied it had com-

mitted an act of bankruptcy or that the proceedings in the State Court was an act of bankruptcy.

At the same time W. C. Stone, plaintiff in the action in the State Court, filed his **separate plea** to the jurisdiction of the District Court under the creditors' petition, which was not replied to or set down for argument.

That thereafter the cause came on for trial before the Court and a jury, and on the 8th day of July, 1909, the jury rendered its verdict upon special issues (Trans. pp 26 and 27) and found:

I. That a fair valuation of defendant's property on the 6th day of Aug. 1907, and

II. On the 12th day of Sept. 1908, was not sufficient in amount to pay its debts, and

III. That the defendant corporation applied for a receiver, being insolvent.

That upon the presentation of the said verdict of the jury, the petitioning creditors moved for an adjudication and **before** any adjudication, the defendant moved in **Arrest of Judgment** upon seven (7) distinct grounds (Trans. pp. 28 and 29) which motion was then and there denied by the Court, and the defendant then and there duly excepted (Trans p. 29) and thereupon an order or judgment of adjudication was given and made and entered (Trans. p. 54). July 9th, 1909.

And thereafter on to wit, the 16th day of July, 1909, the defendant, plaintiff in error here, perfected its writ of error, and filed its assignments of error which we will take up separately:

I

"That the petition in bankkruptcy herein by the petitioning creditors does not set out or specify any act of bankruptcy, and does not state facts suf-

ficient to constitute a cause of action in bankruptcy." (Trans. p. 58). This specification of error assignment was particularly presented to the Court below, in the motion in arrest of judgment, as the 1st ground of said motion (Trans. p. 28).

But so far as this writ of error is concerned, the point could be made for the first time in this court.

Western Union Tel. Co. vs. Sklar, 126 Fed. 295;

Kentucky L. Ins. Co. vs. Hamilton, 63 Fed. 93;

Slocum vs. Pomeroy, 6 Crauch 221;

Bond vs. Dustin, 112 U. S. 609;

Lehnen vs. Dickson, 148 U. S. 71;

Now the only act alleged in the petition of the creditors is the complaint of W. C. Stone in the State Court, and this writ is the proper remedy and procedure the cause being before a jury.

Duncan vs. Landis 106 Fed. 839;

Elliott vs. Toppner 187 U. S. 327;

Can the facts therein alleged and found by the State Court, be contradicted either by averment or proof? We answer "No." If the proceedings in State Court cannot be attacked collaterly, either by averment or proof, then it follows, that for the petition herein to constitute a cause of action, the proceeding in the State Court, upon its face, must show an act of bankruptcy, and no evidence dehors the records of the State Court, can be rendered admissable in this proceeding, by averring a state of facts, which will contradict or impeach that record, and if averred, such averment does not make such testimony admissable.

Now a collateral attack is defined by Van Fleet on Coll Attack in Sec. 3, Ed. 1892.

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its

force and effect in some manner not provided by law" and he says,

Van Fleet, on Coll Attack, Sec. 2. Ed. 1892;

"A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law."

From this it will be seen that as the United States District Court in this cause has no supervisory jurisdiction over the judgment, order or decree of the State Court.

Peck vs. Jenness 7 How. (U. S.) 612;

That this is an attempt to collaterally attack the proceedings in the State Court. The rule is very nicely and clearly stated in

Morrill vs. Morrill, 20 Ore. 96;

"An attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying the decree or enjoining its execution."

It needs no argument therefore to show that the creditors petition in the U. S. District Court is a bold attempt to impeach and discredit the proceedings in the State Court. That petition first sets out the proceedings in the State Court, and then by averments, mostly conclusions of law, attempts to impeach those proceedings by saying they are not what they purport to be. This very thing was attempted in bankruptcy, in

In re Henry Zeltner Brewing Co., 117 Fed. 799,

and the Court says:

"It is urged that under the laws of the state the proceeding has been improperly resorted to by the officers and directors resigning their positions in order to bring the statute under which a receiver was appointed into operation, but that is obviously a matter for consideration by the State Court."

The reason of course being that as the proceedings in the State Court could not be attacked collaterly, such reasons should be presented to the State Court, either by motion for a new trial, or some appropriate proceeding in that court, or else by a suit in equity, to set aside the decree.

This rule, to wit: that the proceeding in the State Court can only be tried by the **face of the record** is very old and founded on wise and just conclusions, for we read in

1 Coke's Institutes, 260;

"The rolls being the record, import in them such uncontrollable credit and verity, as they admit of no **averment, plea** or **proof** to the **contrary.** And if such record be **alleged,** and it be pleaded that there is no such record **it shall be tried only by itself."**

All judicial records shall be tried by inspection.

Hersey vs. Walsh, 38 Minn. 521;
Harmon vs. Moore, 112 Ind. 221;
Littleton vs. Smith, 119 Ind. 230;
1 Chitty's Pleading, 512;
Harris vs. Leiter, 80 Ill. 307;
Stackhouse vs. Zuntz, 36 La. Am. 529;
Hughes vs. Cummings, 7 Colo. 203;
Earle vs. Earle, 91 Ind. 27;
Phillips vs. Lewis, 109 Ind. 62;
Scott vs. Crews, 70, Mo. 261;
Byram vs. McDowell, 83 Tenn. 581;
Beech vs. Rich. 13 Vt. 595;
And in **Exparte** Lennon, 166 U. S. 548;
And W. B. Conkey Co. vs. Russell, 111 Fed. 417;

The rule is laid down that where the proceedings in the State Court shows jurisdiction upon its face, then the facts averred in the State Court cannot be contradicted in **another** court by **averments**

seeking to show that such facts are false, and the Supreme Court says:

"It only appears that to be otherwise, by an allegation for the habeas corpus, and the question at once arises whether where the requisite citizenship appears upon the face of the bill, the jurisdiction of the court can be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill. We know of no authority for such action."

And in the Conkey case the Circuit Court of Indiana says:

"Notwithstanding parties here in this case say that the allegation is false, that certain of the defendants are citizens of Indiana, that issue cannot be tried, except upon a proper issue and proof being made in that case and not in this case. 'It only appears to be otherwise by an allegation in the petition for the habeas corpus, and the question at once arises, whether when the requisite citizenship appears on the face of the bill, as it does in the Conkey case, 'the jurisdiction can be attacked by evidence dehors the record, in a collateral proceeding by one who was not a party to the bill. We know of no authority for such action.' Mr Bessette is a stranger to the bill. He seeks collaterally, being a stranger to the bill to raise an issue that can only be raised in the original suit, by the very parties to the bill. I agree with the Supreme Court of the United States that I know of no authority, and never heard of one that would authorize a stranger to a bill in equity (a man who is not a party to it) to raise a question as to whether or not the averments in the sworn bill were true or false. It cannot be done. In other words, a stranger cannot

fight a battle or wage a contest for the parties to the bill. **That cannot be done."**

So here. The averments in the creditors petition for bankruptcy sets out fully the proceedings in the State Court. There is no question raised as to the jurisdiction of the State Court, under Sec. 94. Corporation law of Nevada **supra.** The proceeding in the State Court is by a **single** stockholder; as such **stockholder** in his **own** name and the complaint is **sworn** to. In the verification the plaintiff swears **"he is the plaintiff."** But it is **sought** by the creditors petition in bankruptcy to show by **averment,** that Stone, the **single** stockholder, in **his own** name, and his **individual** capacity, was **not plaintiff,** and that **he did** not bring the **action,** but that the **action** was by the **corporation.** Notwithstanding the further fact that Sec. 94 of the laws of Nevada creates a **purely statutory** action, and does not under any circumstances **permit** or **authorize** the corporation to sue for the appointment of a receiver, and notwithstanding the further **fact,** that the **corporation** is sued as **defendant,** and had to be **so sued** as defendant, yet the **creditors** by their **petition** first, seek to **contradict** the record in the State Court; second, set aside the law of the State of Nevada, which **only** authorizes the Court to entertain a complaint by a stockholder; and third, have an **impossible thing** take place to wit: the corporation sue itself.

At this point, although breaking the continuity of this brief, let us call the attention of the Court to the fact that this statute Sec. 94 of the Corporation law of Nevada **creates** a purely statutory proceeding, and that the measure of the Court's power is the statute, and that statute must be strictly pursued.

This very question arose in

State I. & I. Co. vs. San Francisco, 101 Cal. 135,

Where on page 146 it is said,

"The jurisdiction of the Supreme Court to decree a dissolution of any corporation exists **only** by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity. (Neall vs Hill, 16 Cal. 145; French Bank case, 53 Cal. 495; Havemeyer vs. Superior Court 84 Cal. 327) either at the suit of an individual (Folger vs. Col. Ins. Co. 99 Mass. 267) or at the suit of the State (Atty General vs. Utica Ins. Co., 2 Johns Ch. 370) and, as its jurisdiction is **derived from the statute,** both as to the **conditions** under which it may be invoked, and the **extent** of the judgment which it may make in the excise of this jurisdiction. (Ver plank vs. Mercantile Ins. Co 1 Edw. Ch. 84.)

And this case further says on p. 148 "That section gives to the Superior Court of the county in which the corporation carries on its business authority to appoint one or more persons to be receivers or trustees of the corporation upon its dissolution **on application of any creditor of the corporation or of any stockholder or member thereof'** and unless **such** application is made the Court **has** no **authority** to make the appointment. Its **jurisdiction** to make such appointment rests **upon an application** therefor by either a **creditor** or **stockholder,** and can **neither** be invoked at the **instance** of a stranger, nor assumed by the Court of its own motion."

Here then is our case. No one but the **stockholder** can **invoke** the jurisdiction. The jurisdiction of the State Court **exists only** by the authority of the

statute. Had the corporation **applied,** the Court could not entertain the complaint and could not act in the premises, and therefore it was **impossible** under the **law of Nevada** for the corporation to **apply,** and as we shall show the bankrupt law requires the **application** to be made **under the law** of the State of Nevada, and as that **cannot** be done, and **was not done,** it cannot be averred or proved and such **argument** in the petition by the creditors does not amount to anything, for that which a corporation **cannot** do it could not **empower** some one else to do.

In Murray vs. American Security Co. 70 Fed 341, This **very court,** speaking through Judge Hawley, says on page 346:

"Courts do not make the laws. They interpret them. If there is no **warrant** in the statute **for the doing of an act,** courts cannot supply the defect. There is nothing in the contention of counsel for plaintiff in error that will justify us in interpolating into the statute something that the legislature has omitted. (People's Savings Bank vs. Superior Court, 103 Cal. 33-36). In whatever light this question may be viewed, we are brought directly face to face with the **unquestioned** rule of law that **in all special statutory proceedings** the measure of the **Court's power** is the **statute itself."**

This is this very court speaking, and it says the **unquestioned** rule is, "that in all special statutory proceedings the measure of the Court's power is the statute itself." This being so, by what species of legal legerdemain can the **statutory** act of a **single** stockholder— the **only authority** or **power** for the court—become the **act** and **deed** of the corporation?

But **this court** did not stop with the above quotation, but said further, p. 346:

"Whatever steps are provided by the statute may be taken by the Court, and no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed upon appeal, and cannot be collaterly assailed."

This decision, if it settles anything, settles two propositions: First, That the proceedings in the State Court are conclusive and cannot be collaterly attacked; and, second, that as the state law is a purely statutory proceeding this court cannot interpret into the statute what the legislature has ommitted, to wit; the right or power of the corporation to apply for a receiver. Therefore two things are true: First, the corporation could not apply for a receiver and the act of the stockholder could not be the act or deed of the corporation; and second, the action of the State Court is conclusive and being conclusive, all the averments of the creditors petition tending to show conspiracy and agreement to enable the stockholder to do only what he alone could do and which the corporation could not do, nor authorize to be done, and which the court would have no jurisdiction to do, is of no force and adds nothing to the petition.

In Fourth Nat. Bank. vs. Francklyn 120 U. S. 747;

"Where a statute creates a right and prescribes a remedy the remedy prescribed is exclusive and must be strictly pursued."

To the same effect, Pollard vs. Bailey, 87 U. S. 520;

And again the rule is,

"Where a statute gives a cause of action and designates the persons who may sue x x x none but the parties so designated can sue."

Barker vs. Hannibal R. R. Co., 91 Mo. 86;

Swift & Co. vs. Johnson, 138 Fed. 867;
Oates vs. U. P. R. R. Co., 104 Mo. 514;
W. U. Telegraph Co. vs McGill. 57 Fed. 699;
Sanders vs. Louisville Exi 111 Fed. 708;

Now by these authorities it is clear that under Sec. 94 of Nevada statute only a **stockholder** can sue. Such being the case, the corporation could not bring the proceeding had in the State Court. And Mr. Anderson says,

Anderson on Receivers, Sec. 18;

"Where the Courts exercise purely statutory jurisdiction its procedings must be within the provisions of the statute. Any action of the Court beyond the provisions would be without jurisdiction. x x x It can make no order and render no judgment beyond the scope of the statute."

Therefore, if the corporation **had applied** for the appointment of a receiver, the court would not have had jurisdiction and its proceedings would be **void.**

Mr. Black on Judgments, Sec. 171.

Says: "The first and fundamental requisite to the validity of a judgment is that it should have been rendered by a court **having jurisdiction.** Without jurisdiction the courts can do nothing, and a judgment given **without** jurisdiction is a **mere nullity."**

VOID JUDGMENTS

Mr. Freeman says:

Secs. 117-120, Freeman on Judgments;

"A void judgment is, in legal effect, no judgment. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. x x x All acts performed under it and all claims flowing out of it are void."

Mr. Black says:

Black on Judgments., Sec. 170;

"Now a void judgment is in reality no judgment at all. It is a mere nullity. x x x It can neither affect, impair nor create rights."

To the same effect are,

In re Christiansen 70 Am. St. 794;
Savage vs. Sternberg, 67 Am. St. 751;
Staffords vs. Gallops, 68 Am. St. 815.

Therefore, if it be true that the complaint of the private stockholder in his individual capacity was in truth and fact the act and deed of the corporation, then the proceedings in the State Court was without jurisdiction and necessarily void, and being void "all acts performed under it and all claims flowing out of it are void and consequently when the creditors undertake to predicate an act of bankruptcy, upon the act of private stockholder in his individual right, when if the corporation had made such application for a receiver its act would be void for want of jurisdiction in the court, it pleads itself out of court because such act of the corporation would be an attempt to base a right upon a void act and such act would be a nullity, and certainly when Congress used the words "applied for a receiver" as we shall hereafter show, it meant a legal and not an illegal application, for Congress goes further and says "under the law of a State, of a Territory or of the United States," meaning of course an application which the laws of Nevada could and would entertain, and upon which the court could legally appoint a receiver. This seems too plain for argument.

But again, the law is universal, that without statutory authority a corporation cannot apply for the appointment of a receiver over its own property, wether solvent or insolvent.

State vs. Ross, 122 Mo. 435;

Jones vs. Bank of Leadville, 10 Colo 464;
In re Brant, 96 Fed. 267;
Federal Cases, No. 6840;
Vila vs. G. Is. E. L. Co., 68 Neb. 222;
Kimball vs. Goodham, 32 Mich. 10;
Hugh vs. McRae (Chase) 466;
Whitney vs. Hanover Nat. B., 23 L. R. A. 531;
Pomeroy's Eq. Rec. Vol. 1, Secs. 118-119;

These cases are so conclusive and convincing they need no attempt at construction. There could be **no action** where the plaintiff and defendant are the same. The corporation cannot sue itself. There must be **adverse** parties. For the rule is,

"Same person cannot be both plaintiff and defendant at the same time in the same action, even in different capacities.

Vol. XV. Encyc. P. and Pr. 481;
Byrne vs. Byrne, 94 Cal. 576;
Blaisdel vs. Ladd, 14 N. H. 129;
Brown vs. Mann, 71 Cal. 192.

And certainly what the corporation cannot itself do it cannot authorize some one else to do. Besides a corporation must **sue** and be sued in its corporate name.

Sec. 3115, Thompson on Cor. (2nd Ed.);
Curtis vs. Murray, 26 Cal. 633;
Sec. 3119, Thompson on Cor. (2nd Ed.);
Sec. 3151, Thompson on Cor. (2nd Ed.).

And the statute of Nevada,

Sec. 3099, Compiled Laws,

Reads, Sec. 4: "Every action shall be prosecuted in the name of the real party in interest except as otherwise provided in this Act."

And the exception is an assignee of a thing in action, guardian, executor or administrator or the trustee of an express trust.

And this rule applies to corporations.

Sec. 3121, Thompson on Cor. (2nd Ed.).

And an officer, director or trustee of a corporation cannot maintain an action in his own name on behalf of or in favor of his corporation.

Sec. 3181, Thompson on Cor. (2nd Ed.).

Nichols vs. Williams 22 N. J. E. 63;

Binney vs. Plundey, 5 Vt. 500.

Now applying the law as hereinbefore set forth, it must be apparent that the only averment of fact which can be looked to, upon the face of the Creditors Petition in Bankruptcy, is the proceedings in the State Court, and that all the other averments add nothing to the effect of the petition and are wholly incompetent, irrelevant and immaterial—and that as the proceedings in the State Court are conclusive and cannot be contradicted by evidence dehors the record, and the proceeding in the State Court is purely statutory, and only applies to a stockholder and the corporation cannot under any circumstances apply for a receiver, that if it did, such proceeding would be beyond the jurisdiction of the Court, is void, and that a corporation can only sue in its corporate name, and that any one who sues in behalf of the corporation must sue by using the corporate name, and that a corporation cannot sue itself, it is clear that the petition of the Creditors does not state facts constituting a cause of action in bankruptcy, unless the proceedings in the State Court, per se, was an act of bankruptcy, under the bankrupt act.

II

The Bankrupt Act, by Sec. 3, Sup. div. 4 of 1898. as amended in 1903, reads:

"4. Made a general assignment for the benefit of

creditors, or being insolvent applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory or of the United States."

It will be seen that the only charge in the petition is that the corporation "being insolvent applied for a receiver;" that is, it is only claimed that the act of bankruptcy was an act of the corporation in applying for a receiver, under the laws of Nevada, being insolvent."

For this reason, the Court submitted the question of the corporation itself applying for a receiver, to the jury,

(Verdict 3, Trans. p. 27.)

Therefore only two questions to wit: First, was the corporation insolvent; and second, Did it apply for receiver, was tried and heard.

(Trans. pp. 26-27).

It being conceded that the filing of the complaint by the stockholder, the same not being based on **insolvency,** was not an **act** of bankruptcy under the provision, "because of insolvency a receiver was appointed," and that the same was not a "general assignment for the benefit of creditors," because under the following authorities it could not be claimed that the proceedings in the State Court was a "general assignment for the benefit of creditors" or an **act** of bankruptcy "because of insolvency" upon the appointment of receiver upon application of a stockholder.

In re Empire Mch Berstead Co., 95 Fed. 957;
In re Empire Mch. Bedstead Co., 98 Fed 981;
In re H. Zeltner Brewing Co., 117 Fed. 799;
In re Gilbert, 112 Fed. 951;
In re Hines, 144 Fed. 142;

Davis vs. Stevens, 104 Fed. 235;
Vacaro vs. Sec. Bank, 103 Fed 436;
Duncan vs. Landis, 106 Fed. 839;
In re Penn Aldrich Co., 165 Fed. 249;

And therefore, the whole petition rests upon that clause or phrase of Sec. 3. Subs. div. 4. of the National Bankrupt Act, to wit: "Being insolvent applied for a receiver or trustee for his property x x x under the laws of a State,of a Territory or of the United States," and therefore the act of bankruptcy charged is "In that it did heretofore, to wit; on or about the 6th day of August, A. D. 1908, being insolvent apply for a receiver for its property." (Trans. p. 5).

There is no allegation anywhere of a stockholders' meeting, or a meeting of the Board of Directors, or of any resolution of any kind by the corporation, and no allegation of corporate authority granted or given to any agent or person and no allegation of any law authorizing or empowering the corporation to act in the premises, or of any corporate power under its charter or by statute, or that the proceeing was in pursuance of any law of the State of Nevada—there is simply the allegation, heretofore quoted (Trans. p. 5) and then the setting out the legal proceedings taken by Stone, as a stockholder, in his own right, and the record of the action of the Court, and then an allegation or conclusion of law, that the same was the act and deed of the corporation, because of an agreement and conspiracy. That such thing should be done "to take such measures and do such acts as would hinder, delay and defraud the creditors of said corporation"—but how a lawful act, can be a conspiracy—how an act which the corporation cannot do, and which clearly appears by the pleaded records of the State Court it

did not do could be a conspiracy, we are not told. Nor how an act which the law warrants, and which could only protect creditors and prevent a preference, could hinder, delay and defraud we are not told. It will be seen that the whole "Petition of the Creditors" is framed by inuendo and legal conclusions to try to evade the plain provision of the bankrupt law, that where the bankrupt law requires in plain language the "corporation itself" to apply for a receiver, and that such application is to be founded upon it insolvency, as the reason for the appointment of a receiver, and to try and make the act of a single stocker, in his individual capacity, the act of the corporation, but overlooking the fact that there is no law in Nevada authorizing a corporation to apply for a receiver under any circumstances. To do this it becomes necessary to violate that cardinal and elementary principle of pleading, that if a court hears a cause, that the proof must correspond with the allegations of the complaint. The allegations of the complaint in the State Court are "That said corporation has liabilities in the sum of Sixty-five Thousand ($65,000) Dollars, and has assets exceeding the sum of Ninety-five Thousand Dollars ($95,000). That owing to the depressed condition of business, etc., the said corporation is in danger of its assets being wasted through attachment or litigation."

Trans. p. 8;

Now Sub-division 15 of Sec. 1, of the National Bankrupt Act of 1898 says: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property x x x at a fair valuation be insufficient in amount to pay his debts."

And Sec. 94, Coroporation law of Nevada supra

gives as one of the grounds for the stockholder to sue the corporation for the appointment of a receiver "or its assets are in danger of waste through attachment, litigation or otherwise."

Therefore, the complaint in the State Court was not founded at all upon insolvency. There could not be any testimony upon that subject, and the appointment of the receiver was not made upon that ground, and it is a rule of law well established, as is said in

Marshall vs. Golden Fleece G. S. M. Co., 16 Nev. 156;

"A judgment must accord with and be sustained by the pleadings of the party in whose favor it is rendered, and no court, jury or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside of the issues."

Therefore the proceeding in the State Court was not an insolvency proceeding—there was no issue of insolvency, and the order appointing the receiver was not made upon any such thought, issue or purpose; and certainly Congress did not intend that the appointement of a receiver over a solvent corporation, or made in a proceeding not based upon insolvency should be an act of bankruptcy: for the purpose of the bankrupt law is to deal with insolvents.

If such is the case, that the bare appointment of a receiver matters not how is an act of bankruptcy, if it could be shown that the defendant was in fact insolvent, although no proceedings in court are based on insolvency, then all the decisions cited in this brief upon bankruptcy, from the Federal Reporter should be reversed, because they only look to the face of the proceedings in the State Court, and hold under such circumstances that insolvency is immaterial, for as is said in

Iner Perry Aldrich Co., 165 Fed. 249;

"Whether the corporation was actually insolvent or not, when the bill was filed or the receivers appointed under it seems to me **wholly immaterial,** unless it can also be made to appear that the **court so found,** either upon the evidence before it or the agreement of the parties, **and made the fact at least one of the grounds of its action."**

The reason is that the record of the State Court cannot be disputed; it is conclusive.

Now take the case of

In re Golden Malt Cream Co., 164 Fed. 326;

There a bill was filed again the corporation by the president and the secretary of the corporation, both of whom were stockholders, for the appointment of a receiver, and alleged the corporation was **insolvent.** The corporation appeared and **admitted** that it was in debt, that a large portion of its debts were past due, that it had no available means at hand to meet the same, but evidently from the **order** of the court upon the hearing, it **denied** insolvency but admitted it by not denying in its answer. Now upon this state of the record after the appointment of the Receiver, a petition in bankruptcy was filed, against the corporation, under Sec. 3, Sub-div 4 of the Bankrupt Law, the same as here, charging the proceeding in the State Court to be an act of bankruptcy. After that, that is after the commencement of bankrupt proceedings, the corporation got a new trial in the State Court, and the plaintiffs amended their complaint alleging the corporation "was in danger of becoming insolvent," and the corporation **denied** it was insolvent, but consented to the appointment of a receiver. The District Court held that this **was not** an act of bankruptcy, and the Circuit Court of Appeals for the 7th Cir-

cuit, affirmed the decision, and why, because the records of the State Court could not be disputed.

Again in Zugalla vs. I. M. A., 142 Fed. 927, on page 935 the Circuit Court of Appeals for the Third Circuit says: "The law requires that the appointment of a receiver **in order to constitute an act of bankruptcy,** must be made by reason of the existence of a **certain fact,** to wit; the insolvency of the corporation. The existence of such fact must **necessarily** be **determined,** either by the admission of the party or by evidence adduced at a judicial inquiry duly had."

Again, insolvency so far as this cause is concerned is immaterial and was not and could not be an issue to be tried in the court below, as the only question is, "Did the corporation commit an act of bankruptcy?" The insolvency of the corporation, under the words "being insolvent, applied for a receiver "has reference to the proceedings in the State Court, being dated and founded on insolvency; that is, was the petition asking for the appointment of a receiver in the State Court asked for, on the ground of insolvency. "Being insolvent," does not mean that if a receiver is appointed upon some other ground, and it should turn out that as a fact the corporation was at that time insolvent, that then such appointment of a receiver would be an act of bankruptcy. Not at all. It means that the appointment of a receiver was made upon the application of the party corporation, upon the ground that it was insolvent and for that reason wanted and prayed for the receiver. These words "being insolvent," refer to the bankrupt asking for a receiver, as distinguished from some other party asking for a receiver and simply means that when the bankrupt asks for a receiver his petition when based

on insolvency is an act of bankruptcy. To file a bill or petition for the appointment of a receiver necessarily demands some grounds to be set out in the petition or bill, which will authorize the Court to act and adjudicate the necessity for the appoint ment of a receiver. That ground must be insolvency. Because the bankrupt act only supercedes State Insolvent laws. If the proceeding in the State Court is not an insolvent proceeding then such proceeding is not affected by bankruptcy in the Federal Court, and for the Federal Court to oust the State Court of jurisdiction, the proceeding in the State Court must be an insolvent proceeding, and therefore to make an act of bankruptcy in the appointment of a receiver in the State Court the jurisdiction of the State Court must be invoked upon the ground of insolvency, for if jurisdiction in the State Court is based upon some other ground then the action of the State Court is valid against bankruptcy procedings in the Federal Court and the action of the Federal Court in subsequent bankruptcy proceeding could not reach or interefere with the State Court or its receiver. Congress never intended a conflict of jurisdiction between the State and the Federal Court. If the State Court appoints a receiver upon grounds indepedent of insolvency, its jurisdiction is complete, and the possession of the property in such receiver is beyond the process of the Federal Court; but if the State Court appoint a receiver upon the ground of insolvency, then such proceeding at once becomes an insolvent proceeding, and is suspended by the proceedings in the Federal Court, sitting in bankruptcy. Now the word "Act," as an "Act" of bankruptcy, means the thing done, and therefore what was done in the State Court is the act of bankruptcy, and to know

what was done, the record of that court is the best and only evidence.

Blue Mt. Iron & Steel Company vs. Partner
131 Fed 57;

When a legislature uses words which have received judicial interpretation they are presumed to be used in that sense.

U. S. vs. Trans. Mo. Frght Assn. 58 Fed. 58;
Sec. 398 Auth. Stst Const. 2nd Ed.
Perkins vs. Smith, 116 N. Y. 441;

We contend therefore that if the words "being insolvent applied for a receiver" has any reference to a corporation at all (and we thing it has not), then we must construe such language as having been used by Congress, as to apply to corporations only, when the law of a State, a Territory or the United States permits and authorizes the corporation in its corporate capacity as a corporate entitle to apply for a receiver. If the law under which the corporation exists and has its being, does not empower the corporation to apply for a receiver and there is no law authorizing it so to do, certainly these words "being insolvent applied for a receiver" has no application to such corporation. Congress knew this. It could not legislate to the contrary. It therefore means by the words "being insolvent, applied for a receiver," that such application for a receiver must be based upon insolvency, so as to make the proceeding in the State Court come within the purview and meaning and jurisdiction of the national bankrupt law. Otherwise there would at once arise a conflict of jurisdiction between the two courts and as the State Court, being a separate and distinct forum, deriving its powers from a separate and independent sovereignty and having a prior and exclusive jurisdiction the Federal Court could do nothing and

the bankrupt law would be a nullity. But the proceeding in the State Court, being founded on insolvency, then the proceeding was an act of bankruptcy, and insolvency **alone,** is nowhere made grounds for an **involuntary** proceeding in bankruptcy. A corporation may be beyond question insolvent, but it cannot be declared a bankrupt for that reason. It must commit an act of bankruptcy—to do that it must apply for a receiver on the ground of insolvency. This is certainly plain. To avoid conflict of jurisdiction between the State and the Federal Court, Congress intended **insolvency,** to be the basis of the proceeding in the State Court, because we must presume Congress was legislating with full knowledge of judicial decision, and was familiar with

Peck vs. Jenness 7 How. 612;
Eyester vs. Faff, 91 U. S. 521;
Metcalf Bros. & Co. vs. Baker; 187 U. S. 165;
Shields vs. Coleman, 157 U. S. 168;
Porter vs. Sabin, 149 U. S. 373;

And many other cases which might be cited and also, that Congress had in view the general principle of law applicable to conflicting jurisdiction between State and Federal Courts, as laid down in such cases as,

State vs. Superior Ct, 28 Wash. 35;
Herron vs. Superior Ct. 136 Cal. 279;

And in Turrentine vs. Blackwood, 125 Ala. 436; where it is said,

"If a State National Court have concurrent jurisdiction over the property of a bankrupt, the Court which first takes cognizance of and acquires jurisdiction over the case has the right to retain it to the exclusion of the other."

The same principle is laid down in

Gay, Hardie & Co., vs. B. C. I. Co., 33 Am. St. 122;

Taylor vs. Carryall, 20 How 583;

Barton vs. Barkow, 104 U. S. 126;

Peale vs. Phipps, 14 How. 373;

And the Supreme Court of the U. S. says,

"When a State Court and a Federal Court have concurrent jurisdiction of a cause, the first Court acquiring jurisdiction retains it to the exclusion of the other."

Home L. Ins. Co. vs. Dunn, 19 Wall. 214;

In re Chatwood 165 U. S. 385;

Orton vs. Smith, 18 How. 263;

Smith vs. McIver, 9 What. 532.

And "The Court which first acquired possession of the **res** cannot be ousted of jurisdiction by a Court of concurrent jurisdiction."

Ellis vs. Davis, 109 U. S. 485;

And such court cannot be deprived of the right to deal with such property until its jurisdiction is exhausted.

In re Johnson 167 U. S. 120;

And draws to itself the exclusive right to dispose of the property for the purposes of its jurisdiction.

Heidreller vs. Ellis Oil Co., 112 U. S. 294;

Robb vs. Connolly, 111 U. S. 624;

Moran vs. Sturges, 154 U. S. 256;

Many more authorities might be cited, but these are enough to show the elementary and universal principles of the law, as to conflict of jurisdiction of courts, of which Congress had in mind, and therefore, necessarily, Congress **intended** in using the words "being insolvent," that the proceeding in the State Court, upon applying for a receiver, should be based upon insolvency, so that such proceeding before the State Court should be an insolvent pro-

ceeding, and thus be suspended by the National bankrupt act, otherwise the proceeding before the State Court could not be arrested by bankrupt proceedings in the Federal Court, and as the State Court having prior and exclusive jurisdiction bankruptcy proceedings in the Federal Court would be a useless act. Therefore we can only look to the proceedings in the State Court, and if they show upon the **face of the record** that such proceeding was not founded upon insolvency no act of bankruptcy could be committed in applying for the appointment of a receiver and insolvency is only **material** when upon the face of the record of the proceeding in the State Court it exhibits the fact whether the State Court acted upon insolvency, as a ground in the appointment of a receiver. If it did not, no act of bankruptcy was committed, and no **issue of insolvency** can be presented or **tried** in the Federal Court, for under such circumstances **insolvency** is wholly immaterial, if the State Court did not act upon insolvency.

This is fully sustained by

George M. West Co. vs. Lea Brothers, 174 U. S. 590;

And while that decision was rendered before the amendment to the National Bankrupt Act of 1903, inserting the words "being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States," the principle and the law there laid down was not in any manner changed by this amendment.

Besides Congress left sub. div. "c," and "d" of Sec. 3 of bankrupt act, stand just as it stood before making this amendment, showing as decided in

George M. West Co. vs. Lea Brothers & Co., 174 U. S. 590;

That insolvency could not be made an issue at all, under Sub. div. 4 of Sec. 3, for had Congress **intended** to change the law as decided in West vs. Lea **supra,** then Congress would have at the same time it amended the law by amending sub. divs. "c" and "d," so that solvency could be set up by the alleged bankrupt as a defense under the amendment.

But Congress knew the law of the land as to conflicting jurisdiction of courts, and therefore intended that before the applying for a receiver could become an act of bankruptcy that such application for a receiver should be based on insolvency.

In fact, the amendment made by Congress upon the face thereof clearly shows that Congress **intended** the state proceeding to be an insolvency proceeding, for it says:

"Or being insolvent applied for a receiver or trustee for his property."

That is, because he is insolvent, he applies to the court on the ground of his insolvency for a receiver or trustee." Why does he ask for a trustee or receiver over his property? Upon what ground can he make such request? What fact can he base his right upon for a receiver? Manifestly insolvency and none other. Besides, Congress fixes the **sole** and **only** ground insolvency, and excludes all other grounds.

Therefore, unless the proceeding in the State Court is based on insolvency it is not an act of bankruptcy, and the question of solvency or insolvency is not an issue to be tried in the Federal Court, and we must look to the face of the proceedings in the State Court, and if that proceeding was not based upon insolvency no act of bankruptcy was com-

mitted, and in this case the petitioning creditors' petition utterly fails to state [illegible] action.

In Re Bubbank Co., 168 Fed. 719;
In Re So. Steel Co. 109 Fed. 702;
(Advance Sheets, No. 4.)

aid down in the following cases, to wit:

In re Rieger et al 157 Fed. 609;
Bank vs. Trekien, 59 Ch. St. 316;
State vs. Standard Oil, 15 L. R. A. 145;
People vs. N. R. S. R. Co. 121 N. Y. 582;
U. S. vs. Milwaukee, 142 Fed. 247;
Halkrook et al vs. Perkins, 147 Fed 166;
Canthra vs. Stewart, 109 N. Y. S. 770;
U. S. Mex. T. Co. vs. Delaware, 112 S. W. 447;
Southern E. S. Co. vs. State 44 So. R. 785;
7 Am. & Eng. Ency. Law, 633-634;
1 Cook or Cor. (5 ed.) p. 27;

Apply to this case. But it will be seen at a glance in reading these cases that the principle involved in them has no application to the point in issue here because those are cases where the "fiction of the corporation is used to an intent and purpose not within the reason and policy of the fiction" as is said on page 634, 7 Am. & Eng. Encyc. Law (2nd ed.) cited by the court, or to use the language of

Thompson on Cor. (2nd Ed.) Sec. 2, 359;

"The doctrine is well supported that a corporation cannot be formed for the purpose of accomplishing a fraud under the guise of a fiction; and when this is made to appear the fiction will be disregarded by the courts and the parties dealt with as though no such corporation had been formed," or also "Equity will set aside transfers made by a debtor, for the purpose of hindering and defrauding his creditors where he turns over all his assets to a corporation organized by himself." And Mr. Thompson cites

the Trebien case, and the Standard Oil case and many other cases to support his text. Why, because in these cases the fiction of the corporation was used for a corrupt end and purpose, either to make the corporate entity the instrument of perpetrating a fraud in receiving property of a debtor to defraud his creditors, or else the stockholders use the corporate entity to perform some act, contrary to the ends and purposes of the corporation, or against public policy, or where corporations have entered into partnerships, contrary to law, as the case of Standard Oil Co., supra, and 121 N. Y. 582 supra, as shown by Mr. Thompson on Corporations.

2nd Ed.) Sec. 2336, where he cites these cases or where a trust is illegally formed to evade the purposes of the corporation and perform acts contrary to public policy, as shown by

Thompson on Cor. Sec. 2140 (2nd Ed.);

Where he cites many authorities and particularly

State vs. Standard Oil Co., supra; and

121 N. Y. 582, supra,

Because in all these cases the corporation was used either for a corrupt purpose or else some act was performed to avoid the corporate purpose and end, and the corporate entity was used to carry out that end. The question of the right of the corporation to sue or be sued, was not involved, and no case is cited or can be cite where the corporate entity can legally sue and be sued, in any other way than in its corporate name. Here the defendant does not attempt in any manner to involve the corporate entity. The action in the State Court was by a single stockholder, under a statute authorizing him to act and not permitting in any manner the corporate entity to act. There is no attempt on the part of the corporation to do anything. There is no attempt to

violate any law. There is no **fraud** against any one. The corporation law of Nevada permits a **stockholder** to thus act, and no one else. Every creditor is required to **know** that the law creating the corporation permits a stockholder to file such proceeding and that by so doing he is not **defrauded** but his rights protected and he contracts with the corporation with such knowledge.

Relpe vs. Rundle, 103 U. S. 222;

Parsons vs. Ch. Oak Etc. 31 Fed 305;

It will be seen that the defendant in the Court below is not pleading corporate entity., but that the creditors to evade the plain provisions of the state law and the Bankrupt law are seeking by evidence alumde of the State Courts proceeding by collateral attack, to make the act of a single stockholder, the act of the corporate entity. The question is not, as stated by the honored District Judge that the **corporate entity** will be disregarded in equity; but can the **petitioning creditors,** contrary to the very decisions cited by the learned court, use the corporate entity to defeat the act of a single stockholder, and make that act a corporate act? Not one of the authorities cited by the court touch this question. They all deal with **frauds** of the corporation or the **fraud** of a creditor, in creating a corporation. They are all actions, brought by the State, in **quo warranto** or by some person injured, to set aside and vacate a fraudulent act. They are all **direct** proceedings, and not **collateral.** They are all seeking to **avoid,** not **maintain,** corporate **entity**; while here the **creditors** are trying to make the **private** act, of a **private** person in his **private** capacity a **corporate act.** They not only seek to do that but to enable them to do so they **must impeach** the records of the State Court. They plead the rec

ord of the State Court, then seek to go behind those records, and collaterly assault those records. This they cannot do. They cite no authority where they can controvert the proceedings in the State Court and make those proceedings something else than what they were. Those proceedings speak for themselves. They cannot be thus impeached. They could be nothing else, under Sec. 94, Nevada Corporation law. If they were as sought to be established here, then the State Court would have **no jurisdiction** in the premises, because the State Court could not appoint a receiver at the **instance of the corporation,** and having **no jurisdiction** the whole proceeding would **be void,** and if **void** then there would certainly be **no act** of bankruptcy upon which to **predicate** the petition in bankruptcy. The argument pleads too much. For if the act is the **act of the corporation,** then the proceeding in the State Court would be **void,** for want of **jurisdiction** in the State Court and being void would be nothing and therefore not an act of bankruptcy, for a void act could not be the foundation of a **legal proceeding.** The bankruptcy act, in using the words "Being insolvent, applied for the appointment of a receiver x x x x under the laws of a state, etc.," means a **legal** proceeding which **can** be made under the laws of the state, and therefore a proceeding which cannot be made, and which the court cannot entertain, could not be a proceeding contemplated by the bankrupt law, and the contention of the Court in his elaborate opinion, has no foundation, either in fact or law; first, because the **fact is,** by the record of the State Court, that the corporation **did not** apply for a receiver, and that record **alone** can be looked to, and second, there is no pretense of any corporate act, by the corporate offi-

cers at any corporate meeting, and third, there is no pretense that Nevada has any law which authorizes the corporation to apply for a receiver, **and we defy any man to find any such law in Nevada,** because it does not exist.

True, by Sub-div. 8 of Sec. 7 of the Act of 1903, Statute of Nevada, 1903, under the powers of corporations, it says:

"8—To wind up and dissolve itself, or to be wound up and dissolved in the manner hereinafter mentioned."

Then, by Sec. 89, of the same statute a method is provided how the corporation may dissolve itself, **entirely** outside any **court** proceeding, to wit; a meeting of the Board of Directors, the adoption by the Board of a resolution to dissolve, at a meeting called for that purpose after three days' notice to every director—then notice to stockholders published for **four** weeks successively in a newspaper, fixing the day and hour of the stockholders' meeting, and two-thirds consent of the stockholders at such meting in writing—the filing of such consent sent with the Secretary of State, and the consent of certain creditors. Then the Secretary of State issues on the original articles of incorporation, a "certificate of dissolution." This proceeding is not in court, and there is no receivership or anything. This is the power of the corporation **itself** and **the only power.** These proceedings were not taken and no such claim is set up, and therefore has no bearing in this case.

Sec 7 of said act designates the powers of the corporation and nowhere under those powers is it granted any powers to sue **itself** or **apply** to a court for the appointment of a receiver.

And Sec. 9 of said act, specially provides, "And no

corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given."

The learned Court says (Trans. p. 38): "The fact that certain powers are conferred by statute upon corporations does not mean that a corporation is unable to perform any act beyond the scope of such enumerated powers."

This is not in harmony with the rule of law as laid down by authority; because the Supreme Court of the United States holds, "A corporation cannot do anything except the powers granted. The enumeration of its powers excludes all others."

Thomas vs. West, R. R. Co. 101 U. S. 71;
Central Trans. Co. vs. P. C. Co., 139 U. S. 48;
Augusta Bank vs. Earl, 13 Pet. 587;

Then the learned Court further says (Trans. p. 38): "The statute restricts the authority of the corporation and fixes the limits beyond which its acts are unlawful, and in excess of the powers conferred." This is true, but the Court misapplies it, because to sustain the Court's position the act of the single stockholder, in filing his complaint in the State Court must be the lawful act of the corporation. If it was an ultra vires act, then it was unlawful and cannot be a lawful act, upon which to base the proceedings. The court fails to distinguish between a lawful act of a corporation, and a suit brought to punish a corporation for an unlawful act. When we claim that a corporation acts lawwully and that its act is the deed of the corporation within its powers, then the burden of proof falls upon the person so claiming, and it must be shown and proved that the corporation had the power to act and acted within those powers. On

the other hand when the State, through its penal laws, seeks to **punish** the corporation, or set aside its **ultra vires acts a question** arises not involved in this case. One seeks to **enforce** the acts of the corporation as valid, legal and proper; while the other is a **direct attack,** made **always against** the corporation to **vacate, set aside** and **nullify** the act. Here, in this case, it is sought in a**collateral** proceeding, not to set aside or vacate, the act of a corporation, but to make the act of a **single** stockholder in his individual capacity the **act of the corporation—to make a corporate act**—that is, **create** a **corporate** act—which corporate act when created shall be a **legal** and **proper** act. It then must be seen that the authorities cited by the Court do not deal with the issue in this case.

The rule contended for by the Court would reverse the decision of

In re Quartz Gold Mining Co. 157-243;

Which was distinctly upheld and sustained even to the adoption of the opinion of the lower Court, by **this Honorable Court** in

Van Emon et al vs. Veal. 158 Fed 1022;

And also is not in harmony with,

Germania S. V. Co. vs. Boynton 71 Fed 799;

Where it is held "that the **acquiescence** of **all** the **directors** and **stockholders** of a corporation **will not** validate a transaction outside the corporate powers."

Or as is held in

Curtin vs. Salmon R. Etc. Co., 80 Am. St. 132;

Ratification cannot give effect to an unauthorized Act, unless the person or body making the ratification could have in the **first instance authorized** the act."

Or as is held by the following authorities:

"Neither a majority of the Board, nor all of them acting separately can bind the corporation as to matters which they are only authorized to act upon as a board."

Gashwiler vs. Willis, 33 Cal 11;
Kansas City Hay Press Co. vs. Deval, 72 Fed. 77;
Johnson vs. Sage, 44 Pac. 641;
Hillyer vs. Overman S. M. Co., 6 Nev. 51;
Sec. 1069, Thompson on Cor. (2nd Ed.);
Sec. 1071, Thompson on Cor. (2nd Ed.);

And by Sec. 23 of the Incorporation of Neveda, the powers of the corporation is vested in the Board of Directors, making the cases of

Gashwiler vs. Willis, 33 Cal. 11;
Kansas City Hay Press Co. vs. Deval 72, Fed 77;

Eactly applicable to this case, because under the California case and the Federal case, like our law, there is no power conferred on the stockholders, as that power is vested exclusively in the Board of Directors, and there is no pretense that there ever was ameeting or action of the Board of Directors in this matter.

The whole argument of the learned Court is based upon the proposition that there are cases when in equity the court will go behind the legal fiction of corporate entity, and remedy a corporate evil. But the Court cites no case where the shareholders in his individual right can usurp and absorb the corporate entity; for as is held in

Thomas vs. Matthiersen 170 Fed. 362;

Where it is said on page 363, "The shareholder and the corporation are different entities."

So in State vs. Standard Oil Co., 49 Oh. St. 541;

Cited by the court, it will be seen that so far as the right of "suing ad being sued is concerned that court maintains corporate entity. The rule is **universal,** that a stockholders cannot sue **for** and in **behalf** of the corporation, except under the circumstances set forth in,

Howes vs. City of Oakland, 14 Otto. 450;

And there is no averment in the petition of fact, or attempt to show any fact or circumstance warranting a stockholder to sue **for** and **in behalf** of the corporation, and it is said in the notes to

97 Am. St. p. 30;

"It is an elementary proposition of law, needing the citation of no authority to support it, that a corporation is an entity distinct and apart from the members who compose it, and that generally speaking, **all duties** and **obligations** owing it can be **enforced only** by suits brought **in its name.**" All the grounds where the stockholders may sue for the corporation are particularly set out in

Hawes vs. Oakland, 104 U. S. 450;

We must keep in mind that to sustain this bankruptcy petition, it must be found that the **corporation applied** for a receiver and to do so the stockholder had to **sue for and in behalf** of the corporation.

But a stockholder can only sue, as a stockholder, when he sues to protect **his rights,** and these rights are dual to-wit; when he has a grievance **against** the corporation affecting him **individually** as such stockholder and then he **sues the corporation,** and when within the corporate body in connection with all other stockholders, he exercises his rights as such stockholder, within corporate action, and in this case he cannot sue, except in his own behalf and in behalf of all other stockholders--but the ac-

tion must be for and in behalf of the corporation, and to enable him to thus sue he must plead and prove the failure and inability of the corporation to act, his attempt to obtain corporate action and his failure in that behalf and other such matters or to use the language of Justice Miller in

Hawes vs. Oakland, 104 U. S. 450;

"He must make an earnest and not a simulative effort with the managing body of the corporation, to induce remedial action on their part, and this must be made to appear to the Court. x x x And the failure in these efforts should be stated with particularity."

And Mr. Morawitz, on Cor. Sec. 239 (2nd ed.) says: "A shareholder cannot sue if the corporation is able to protect itself."

Also Mr. Cook on Stock and Stockholders, Sec. 692 says: "The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied."

Now then the law of corporations knows no such thing as a stockholder being authorized by the corporation to bring a suit or proceeding for and in behalf of the corporation as a stockholder. If it can be brought as the agent, then it must be in the name of the corporation, and the averments of the complaint must show that it is a corporate suit for a corporate purpose, and it must show the corporate power and authority to prosecute the action and must be a corporate cause of action.

After careful and diligent search we cannot find one case where a court of law or of equity ever set aside the coroprate entity to enable a private stockholder, in his individual right to prosecute an action which he alone could bring, and which the corpor-

ation **could not** bring, when the action had to be prosecuted against the corporation to make such **action** a corporate act. There are no such authorities. To hold is to set aside the Statute of Nevada, and change completely the law of corporations as to the relation and powers of stockholders **inter se,** and outside corporate functions.

The Court further comments upon and sets out certain testimony of certain facts, occurring in 1906 and 1907, long prior to the proceedings in the State Court and then claims that these things were done "to hinder, delay and defraud creditors" But there is no such ground as "hinder, delay and defraud creditors" as an act of bankruptcy and these things are not evidence of any kind, except under the 1st Act of Bankruptcy.

Sec. 3, Bankrupt Act.;

When a party "conveyed, transferred, concealed or removed or (permitted to be concealed or removed) any part of his property with intent to hinder, delay or defraud his creditors or any of them," and this is a separate act of bankruptcy not alleged or pretended to exist in this action, and even under that clause on averment in the language of the statute is not sufficient.

In re White 135 N. Y. 199;

In re Hark Bros. 135 N. Y. 603;

But here in our case the act of bankruptcy "is applying for a receiver being insolvent." The corporation either did so or it did not. It does not matter how the business of the corporation was conducted or how books were kept and how much money it took in or how it paid out the same or to whom it paid it, nor does it matter in the least that it **consented** to the appointment of a receiver. These matters are wholly immaterial, for the rule is:

"Obtaining the appointment of a receiver by an insolvent partnership through dissolution proceedings in a State Court, though such action was taken for the purpose of preventing the bankruptcy court from obtaining possession of the assets, is **not an** act of bainkruptcy under Bank Act, 1898, Sec. 3a. cl. 1). There the act of bankruptcy was alleged under Sub-div. 1 of Sec. 3, where the words "hinder, delay or defraud creditors are used. The rule being that the pleader must stand or fall upon the **ground** or **act** of bankruptcy alleged, and that case also says:

"My attention has not been called to any authority decisive of the point involved but the tendency of the court is apparently adverse to extending the bankruptcy jurisdiction to cases not clearly within the provisions of the law," (citing 95 Fed. 957; 98 Fed. 981; 99 Fed. 76; 103 Fed. 436, and 97 Fed. 489).

And **"consent"** to the appointment of receiver does not affect the question because the "act" must be "voluntary" not permissive.

Vacaro vs. Security Bank, 103 Fed. 436;

And further the clause "with intent to defeat or delay the operation of this act" as used in Sec. 39 of the old act of 1867, is not in the present act,

Vacaro vs. Security Bank, 103 Fed at p. 440;

Baker-Ricketson Co., 97 Fed. 489;

And therefore, it matters not what salary was paid Mr. Stone, or that they refused to permit the books of the corporation to be examined, particularly as they had no control over the books after the corporation passed into the hands of the State Receiver, and there is no pretense of any demand to examine the books until the State Court took possession. All

these matters are beside the question which is. "Did the corporation apply for a receiver?"

So in Davis vs. Stevens, 104 Fed. 235;

It is said, "The consent of a partnership although insolvent, to the appointment of a receiver for its property by a State Court, and the surrender of its property to such receiver, do not constitute an act of bankruptcy, under Bankr. Act of 1898, where it is not shown that any creditor obtained preference over another."

We need not cite further authorities on these lines because it must be apparent that the whole question of an act of bankruptcy is what was done in the State Court, and that in that Court there must be some allegation of insolvency, some finding of fact to that end and purpose, because in Involuntary bankruptcy cannot be predicated alone on insolvency and as a corporation by Sec. 4 of the Bankrupt Act cannot make a voluntary application, therefore it does not matter how insolvent a corporation may be it cannot be put into bankruptcy at all, unless it commits an act of bankruptcy. The first question there is, did it commit an act of bankruptcy? If it did not, it cannot be declared bankrupt? To know whether it committed an act of bankruptcy, the proceedings in the State Court speak for themselves. They cannot be contradicted. They are conclusive. If, therefore, the complaint in the State Court was not founded and based upon insolvency there was no act of bankruptcy

IV.

But the learned trial Judge seems to hold that the Statute of Nevada was an Insolvent Statute, but it will be seen that the authorities cited by him will not sustain any such conclusion, because

In re Salmon, 143 Fed. 395;
Was under a purely insolvent law, and no proceedings under the law of Missouri, under consideration in that case could take place, except upon a finding of **insolvency.** The Secretary of State could not move at all unless the **bank** was **insolvent** and the court had no jurisdiction except the proceeding was purely insolvent and the only **point** as to that law **not being** an insolvent law was made in the case, was that because there was no **discharge** of the debtor it was not an insolvent law and the Court simply held that fact **alone** did not prevent the law from being an insolvent law. And rightly, because the whole law was **insolvency** and nothing else.

Hansbrough vs. Costello, 184 Ill, 110;
Cited by the Court is not in point, because the assignment law of Illinois was a regular insolvent law and enacted for that purpose and the Court says in that case: "The assignment act of Illinois has been held to be a **general** insolvent law and was so intended by the legislature."

The other cases cited by the learned Court are not within our reach, and we therefore cannot comment upon them, but our act of Incorporation law has no **intent** of any kind of being an insolvent law, and besides the one necessary ingredient of every insolvent and bankrupt law, to wit: an assignment and transfer of his property, for as

Mr. Jones on Ins. & Failing Cor. Sec. 21;
Says, speaking of Insolvent and Bankrupt laws: "In ?????????? there must be an assignment for the benefit of creditors, "that is, to be an insolvent law it must be passed by the legislature for the express purpose of **protecting** creditors, and for the benefit of the debtor and there must be some abso-

lute assignment of the debtor's estate, and some provision for discharge.

And the following authorities show clearly that our state la wis not an insolvent law:

Steelman vs. Mattix, 36 N. J. 344;
Sullivan vs. Hiskell (Crabbe, Pa.) 525;
Eh???? vs. Adams, 13 Bankr. R. 141;
Mayer vs. Hillman, 91 U. S. 496;
Cook vs. Rogers, 31 Mich. 391;
This decision—91 U. S. 496—is exactly in point.

V.

The foregaing parts of this brief cover all questions raised in our assignment of errors, except the "7th" and "8th," and we desire to say that in thus grouping 1st, 2nd, 3rd, 4th, 5th, 6th and 9th assignments under the discussion of the 1st assagnment we do not waive the other assignments, but simply present the points raised in each by a full discussion under the 1st assignmen.t

Now the 7th and 8th assignments of error raises the question that the verdict of the jury is outside any **triable** issue, and that the Court could not pronounce or enter a judgment of adjudication upon them, and therefore **erred** in not granting our motion in arrest of judgment.

By Bankrupt Act, Sec. 3;

It will be seen that (sub-div. "c.") allows defense of **solvency** to be made **only** to the first sub-division of Sec. 3; that is, when the defendant is charged with (1) "conveyed, transferred, concealed, etc.," (And sub-div. "d.") only allows **solvency** to be set up when the act of bankruptcy charged is under sub-div. "2" or "3," but that the **righ** to plead **solvency** as a **defense,** cannot be set up to either sub-

division "4" or "5." The reason is that under subdivision 1, 2, or 3, if the party is solvent he has in the law the right to do these acts, and there must also be an **intent** under the 1st to hinder, etc., under the 2nd to prefer, etc., and under the 3d an **intent** to **prefer.** But in the 4th and 5th the doing the act **itself,** wthether solvent or insolvent is an **act of bankruptcy** and therefore the **fact** that the petition in bankruptcy **charges insolvency** and the answer **denies** it, does not make a **triable issue.**

This very contention of ours is squarely decided in

George M. Wert Co. vs. Lea Bros. & Co., 174 U. S. 590;

And under that decision the 1st and 2nd verdicts of the jury are nothing at all, because **insolvency was not** and **could not** be an issue. To the same effect:

Day vs. Back etc., 114 Fed. 834;
Acme Ford Co. vs. Meier, 153 Fed. 74;
In re Sully, 142 Fed. 895;
In re Duplex Bal. Co., 142 Fed. 906;

There being therefore no **issue** of **insolvency,** the only question which could be tried (and that was **purely** of law for the court) **was the proceeding in the State Court an Act of Bankruptcy?** And this could **only** be **tried** upon the **face** of the **record** in the State Court, and "the rule is well settled and it would seem has never been doubted or questioned, that in civil actions tried before a court with a jury it is the province of the Court to determine questions of law."

XXIII Am. & Eng. Cyc. Law 545 (2nd Ed);
Easton vs. Bank of Stockton, 66 Cal. 123;
Grant vs. Moore, 29 Cal, 652;
Fulton vs. Onesti, 66 Cal. 575;

Wilson vs. Van Leer, 127 Pa. St. 371;
And all questions which arise upon the pleadings are questions of law for the Court.

XXIII Am. & Eng. Cycl. Law 552 (2nd Ed.);
The constructions of **judicial records** is for the Court.

XXIII Am. & Eng. Cycl Law 555 (2nd Ed.).
Therefore the third issue presented to the jury is one of law. There was no **fact to** be determined by either the Court or jury. The proceedings in the State Court were pleaded by the Creditors and admitted by the defendant. The only question was one of law, based solely on the **face** of that record. All the other evidence before the jury was wholly incompetent, irrelevant and immaterial and outside any issue to be tried. The Court, therefore, **erred** in denying the motion for arrest of judgment, and the **verdict** of the **jury** could not be the foundation for an **adjudication** at all.

We therefore, respectfully request that this Writ be sustained, the petition of the creditors be denied and a mandate issue that the cause be dismissed.

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